TO: Magalie Roman Salas
FROM: Policy and Program Planning Division, CCB
DATE: September 10, 1999
RE: CC DOCKET NOS. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147

The attached Brief of Petitioner US WEST Communications, Inc. is submitted for inclusion in the record of the above-captioned dockets.

ORAL ARGUMENT SCHEDULED FOR OCTOBER 21, 1999

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1410

U S WEST COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PETITIONER

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May 17, 1999

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), petitioner U S WEST Communications, Inc. submits the following information:

(A) Parties and Intervenors

Petitioner U S WEST Communications, Inc. is a telecommunications carrier that provides local exchange telecommunications, data, wireless, and long-distance services pursuant to tariff and contract in fourteen western and midwestern states. U S WEST Communications, Inc. is a wholly owned subsidiary of U S WEST, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. In addition to U S WEST, Inc., subsidiaries U S WEST Communications, Inc. and U S WEST Capital Funding, Inc. have securities in the hands of the public. U S WEST, Inc. owns other subsidiaries that market unregulated products and services, none of which has issued debt or stock to the public.

The respondents in this action are the Federal Communications Commission and the United States of America.

The following parties have intervened in this action: Telecommunications Resellers Association, e.spire Communications, Inc., Competitive Telecommunications Association, Sprint Corporation, MCI Telecommunications Corporation, AT&T Corporation, Association for Local Telecommunications Services, SBC Communications, Inc., Southwestern Bell Telephone Company, Pacific Bell, Nevada Bell, LCI International Telecom Corporation, Network Access Solutions, Inc., GTE Service Corporation, Rhythms Netconnections, Inc., Transwire Communications, Inc., Northpoint Communications, Inc., Internet Access Coalition,

Covad Communications Company, KMC Telecom, Inc., Hyperion Telecommunications, Inc., McLeodUSA Incorporated, and Focal Communications Corporation.

(B) Ruling under Review

U S WEST Communications, Inc. has petitioned the Court to review the Memorandum Opinion and Order adopted by the Federal Communications Commission in CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-81, 98-147, CCB/CPD No. 98-15, and RM 9244, *Deployment of Wireline Services Offering Advanced Telecomm. Capability*, 13 FCC Rcd 24011 (1998). The order is numbered FCC 98-188 and was released on August 7, 1998. A summary of the order was published in the Federal Register on August 24, 1998. *See* 63 Fed. Reg. 45134 (1998). A copy of the order appears in the Joint Appendix at ___.

(C) Related Cases.

This case has not previously been before this Court or any other court. On August 14, 1998, Southwestern Bell Telephone Company petitioned the United States Court of Appeals for the Eighth Circuit to review the same order involved in this case, but subsequently withdrew its petition. U S WEST Communications, Inc. is not aware of any other cases involving substantially the same parties and the same or similar issues.

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GLOSSARY

ALTS: Association for Local Telecommunications Services

DSL: Digital subscriber line (service or technology)

FCC: Federal Communications Commission

LEC: Local exchange carrier

PCS: Personal Communications Service

PSTN: Public switched telephone network

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BRIEF OF PETITIONER

JURISDICTIONAL STATEMENT

This is a petition to review a final order of the Federal Communications Commission ("FCC"), released August 7, 1998 in CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-81, 98-147, and CCB/CPD No. 98-15 and RM 9244, *Deployment of Wireline Services Offering Advanced Telecomm. Capability*, 13 FCC Rcd 24011 (1998) ("*Advanced Services Order*"). The order is reprinted in the Joint Appendix ("J.A.") beginning at page ___. A summary of the order was published in the Federal Register on August 24, 1998. *See* 63 Fed. Reg. 45134 (1998). U S WEST Communications, Inc. ("U S WEST") timely filed its petition for

review on September 2, 1998. This Court therefore has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Venue lies in this Circuit pursuant to 28 U.S.C. § 2343.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the FCC violate the Telecommunications Act of 1996 (the "Act") by ruling that digital subscriber line ("DSL") services may be regulated as "telephone exchange service," even though these services do not stay within a local exchange, do not interconnect with the local exchange network, do not permit local any-to-any calling, and are not included in the basic local calling charge?

2. Did the FCC violate the Act by ruling that DSL services may be regulated as "exchange access," even though they are not used to begin and end telephone toll calls, and even though they are mutually exclusive "information access" services?

3. Did the FCC act arbitrarily and capriciously by failing to articulate any definition of "telephone exchange service" and "exchange access," refusing to specify which of these statutory categories covers DSL services, and failing to explain why it believes either of these categories applies to DSL services at all?

RELEVANT STATUTORY PROVISIONS

Pertinent statutory provisions are set forth in Addendum A, which is bound with this brief.

STATEMENT OF THE CASE

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.* (hereinafter "the Act" or "the 1996 Act"), regulates telecommunications carriers according to the different types of service they provide. One set of the Act's rules, designed to promote competition in the local telephone marketplace, applies to "local exchange carriers." "Local exchange carriers" are defined in the Act as entities that provide either of two specific local telephone services: "telephone exchange service" or "exchange access." 47 U.S.C.

§ 153(26). Both the Act and consistent FCC administrative precedent define "telephone exchange service" as basic local calling service and its substitutes, and "exchange access" as the local leg of a telephone-to-telephone long-distance call.

This is a petition for review of an order of the FCC applying these statutory categories to a new kind of high-speed data and Internet access service known as digital subscriber line service, or "DSL." *See Deployment of Wireline Services Offering Advanced Telecomm. Capability*, 13 FCC Rcd 24011, 24031-34 (¶¶ 38-44) (1998) (hereinafter, "*Advanced Services Order*"). In February 1998, U S WEST, a carrier providing both local telephone and DSL services in fourteen states, petitioned the FCC for a declaratory ruling clarifying the regulatory status of its DSL services. (Joint Appendix ("J.A.") at ___-___.) In its petition and its comments on similar petitions filed by other parties, U S WEST demonstrated that its DSL services are not, and indeed are fundamentally unlike, the traditional local telephone services long held to come within the definitions of "telephone exchange service" and "exchange access": those DSL services are not functional or market substitutes for basic local calling, do not use or interconnect with the local exchange network, and are not used to begin and end toll telephone calls. (J.A. ___-___, ___-___, ___-___.)

In the order under review, the FCC rejected these arguments. The FCC ruled that DSL constitutes either "telephone exchange service" or "exchange access" (although it declined to say which), making a carrier that provides DSL service a "local exchange carrier." *Advanced Services Order*, 13 FCC Rcd at 24032 (¶ 40). The FCC did not articulate any definition of "telephone exchange service" or "exchange access," nor did it give any reason *why* it believed one or the other of these categories covers DSL service. The effect of the FCC's ruling is to

extend local telephone marketplace regulation to these new data and Internet access services, even though they do not share any of the defining characteristics of local telephone service.

U S WEST petitioned this Court to review the *Advanced Services Order* on September 2, 1998. On October 8, the FCC moved the Court to hold the case in abeyance. The Court denied the FCC's motion on December 22, 1998. U S WEST now asks the Court to vacate the *Advanced Services Order* as contrary to the Telecommunications Act and as arbitrary and capricious.

STATEMENT OF FACTS

A. Statutory Background

Sections 251(b) and (c) of the Telecommunications Act of 1996 place a number of network- and market-opening obligations on "local exchange carriers" (or "LECs") to promote competition in the local telephone service market. *All* "local exchange carriers," for example, must make their services available to other carriers for resale, provide access to their rights-of-way, and allow their customers to access other carriers' services through nondiscriminatory dialing arrangements. *See* 47 U.S.C. § 251(b). In addition, the *incumbent* "local exchange carrier" in an area — the one that first provided local telephone service to the area — must interconnect with its competitors on reasonable terms, give them access to certain elements of its network on an unbundled basis, and provide them with its local retail services at a substantial discount for resale. *See id.* § 251(c).

The Act defines "local exchange carriers" by the services they provide. A "local exchange carrier" is "any person that is engaged in the provision" of either of two specific local

telephone services: "telephone exchange service" and "exchange access." *Id.* § 153(26). What Congress meant by these two terms is the primary issue in this case.

Congress defined "telephone exchange service" as *either* (a) "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge," *or* (b) "comparable service provided through a system of switches, transmission equipment, or other facilities." *Id.* § 153(47). In general, and as explained below, "telephone exchange service" is basic local calling service — what a customer receives for paying his or her basic monthly charge to a company such as Bell Atlantic or U S WEST.

"Exchange access," the other local service that defines a LEC, is "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." *Id.* § 153(16). "Exchange access" allows long-distance companies such as AT&T to use the local exchange network to begin and end the long-distance ("toll") telephone calls placed by local subscribers. As explained in greater detail below, "exchange access" is one of two different kinds of access services recognized in the Act; the other kind, "information access," refers to services that connect local subscribers to providers of information and data services. *See* 47 U.S.C. § 251(g) (preserving AT&T divestiture consent decree distinction between "exchange access, information access, and exchange services"); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 228-29 (D.D.C. 1982) (consent decree; defining "exchange access" and "information access").

The definitions of "telephone exchange service" and "exchange access" are thus the key to determining whether the provision of a particular service is subject to the Act's rules for the local exchange marketplace. If a carrier is providing a service that qualifies as either "telephone exchange service" or "exchange access," the carrier is acting as a "local exchange carrier" and must provide the service subject to the obligations in section 251(b) of the Act and, if the carrier is an incumbent LEC, section 251(c). Conversely, if a carrier is providing something that is neither "telephone exchange service" nor "exchange access," it is not acting in the capacity of a LEC, and it may provide the service free from LEC regulation. For example, when AT&T enters a local market and provides basic local calling service (*i.e.*, "telephone exchange service") in competition with an incumbent LEC, AT&T is acting as a LEC and must provide that service subject to section 251(b). But AT&T is not subject to that section when it sells long-distance services in the same market, since it does not provide those services in its capacity as a LEC. Thus, a competitor cannot demand the right to resell AT&T's long-distance voice and Internet backbone services under the requirements of section 251(b)(1), for example, or demand access to the rights-of-way containing AT&T's interexchange fibers under section 251(b)(4).[1/]

[1/] Likewise, the mere fact that a carrier provides local exchange service as an incumbent LEC does not mean that *all* of its telecommunications services are subject to incumbent LEC regulation. Even though GTE and Sprint are the incumbent LECs in some service areas (such as some of the Virginia suburbs of Washington, D.C.), competitors cannot obtain unbundled access to the elements of Sprint's long-distance and international networks under section 251(c)(3), or resale discounts on GTE's nationwide Internet backbone under section 251(c)(4), because these are not services provided by Sprint or GTE in their capacities as "local exchange carriers."

B. Traditional Telephone Local Exchange Services

The public switched telephone network ("PSTN") is made up of local switching centers, called exchanges,[2] and long-distance (or "interexchange") connections between them. *See MCI Communications Corp. v. American Tel. & Tel. Corp.*, 708 F.2d 1081, 1093 nn.8-9 (7th Cir. 1983) (describing generally local and long-distance telephone service). A single local exchange covers a limited geographic area. Within a single exchange area, virtually every home or business is connected to a switching office (or "central office") by a pair of copper wires known as a "loop."[3] Each of the central offices, in turn, is connected by trunk lines to every other central office in the exchange.[4] Switches in the central offices route signals along these trunk lines through the telephone company's network.[5]

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[2] *See* Harry Newton, *Newton's Telecom Dictionary* 301 (15th ed. 1999) (defining "exchange" as "a telephone switching center" and, by extension, the local area served by a switching center); *General Tel. Co. of Calif.*, 13 F.C.C.2d 448, 460 n.23 (1968) (defining "exchange" as "a central office, or a system operated by it, providing telephone communication in a community or in part of a city"). In larger communities, a telephone company will generally use multiple switching offices in place of a single one to provide switching across the local exchange area. *See* 47 U.S.C. § 153(47)(A).

[3] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15691 (1996) (hereinafter "*Local Competition Order*"). *See also Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 597, 601 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3561 (U.S. Feb. 26, 1999) (No. 98-1381) ("local loops . . . connect end users to the local exchange").

[4] *See Southwestern Bell Tel. Co.*, 153 F.3d at 601 ("Interoffice transmission facilities are the highways of the local exchange. They connect the end offices and tandem switches within the local exchange to one another and carry telephone traffic between and among these offices and switches.").

[5] *See Southwestern Bell Tel. Co.*, 153 F.3d at 601 ("[T]he various switches . . . determine which interoffice transmission facilities are used to transport the traffic from switch to switch."); *Local Competition Order*, 11 FCC Rcd at 15706.

When one party in a local exchange dials any other party in that same exchange, the switches choose a path to the second party and establish a temporary "circuit" between the two parties (a process known as "circuit switching"), enabling them to talk to each other. *See* Kevin Werbach, *Digital Tornado: The Internet and Telecomm. Policy* 45 (Federal Communications Comm'n, OPP Working Paper Series No. 29, 1997) (hereinafter "*Digital Tornado*"). The parties have exclusive use of the circuit for the entire duration of the call; only after they hang up can portions of the path be used by other callers. *See Digital Tornado* at 38, 39. This local exchange network is an "any-to-any" network, meaning that any user in the exchange can dial up and establish a two-way connection with any other user in the local exchange. Customers ordinarily pay a basic monthly fee — the "exchange service charge" referred to in the definition of "telephone exchange service," 47 U.S.C. § 153(47)(A) — to cover all calling within the exchange. *See Digital Tornado* at 39.

Long-distance (interexchange) telephone calls are routed similarly. When a party in one local exchange makes a call to a party in a different exchange, the call travels over the loop from the caller's premises to the central office serving those premises, where it is then routed to the customer's long-distance (interexchange) carrier. The interexchange carrier carries the call over its long-distance network to the local exchange of the called party. *See MCI Communications Corp.*, 708 F.2d at 1093 n.9. The call then travels over the second local exchange network to the central office and loop serving the called party. Again, the service is circuit-switched — that is, the switches establish a temporary, exclusive path for the call. *See Digital Tornado* at 37 (diagram). Local exchange carriers provide access to their exchanges ("exchange access") to enable the interexchange carriers to complete these calls, charging local

users and the interexchange carriers "access charges" for this service. *See Access Charge Reform*, 12 FCC Rcd 15982, 15990-94 (1997) (discussing access charges generally). These long-distance calls are also known as "toll" calls because the caller pays a separate charge for them over and above the basic monthly "exchange service charge."

C. **Digital Subscriber Line Services**

Digital subscriber line, or DSL, services are fundamentally different from traditional local telephone exchange service and make no use of the circuit-switched PSTN. DSL services enable subscribers to use their existing loops, not for calling within a local exchange area, but to send and receive data at extremely high speeds to and from information service providers located around the world. *See GTE Tel. Operating Cos.*, 13 FCC Rcd 22466, 22470-72 (1998) (hereinafter "*GTE ADSL Order*"). Subscribers use DSL services primarily to obtain a dedicated high-speed connection to their chosen Internet service provider (such as America Online), which then allows the subscriber to access the global Internet and retrieve information stored on distant computer servers. *See id.*

Unlike traditional circuit-switched telephone services, DSL transports information over a *packet*-switched data network. Data is divided into separate packets, with each packet having its own unique identification and destination address. *Advanced Services Order*, 13 FCC Rcd at 24015-16 (¶ 6); *Digital Tornado* at 18. The packets travel independently over the network, often by different routes, and are reassembled only at their final destination. *See Digital Tornado* at 17. As they travel, the packets share the network with packets of other, unrelated communications traveling toward the same or different destinations. Routers

distributed throughout the network read the address on each packet and send the packet along the best network path available at that time. A packet-switched network does not establish an *exclusive* circuit, even temporarily, between end users on a call. Instead, it establishes "virtual circuits," in which packets from multiple transmissions are intermixed in the same facilities. *See Advanced Services Order*, 13 FCC Rcd at 24015-16 (¶ 6).

DSL technology enables the loop to carry packets of data at very high speeds compared to ordinary circuit-switched connections. Before the advent of DSL technology, the loop was "generally thought to be capable of carrying only a relatively modest stream of information," in large part because data had to be translated into analog telephone signals and sent over the loop in analog format. *Id.* at 24026 (¶ 28). DSL technology overcomes this limitation by allowing packets of data to remain in digital form and travel alongside voice signals on the same loop but at different frequencies. *Id.* at 24026-27 (¶ 29). Because voice and data travel in different frequency bands, they can share the loop *simultaneously*, allowing customers to access the Internet while having a voice conversation over the same line. *Id.*

The DSL services considered by the FCC use a pair of devices attached to each end of the subscriber's loop. The device at the subscriber's house or business distinguishes between voice and data traffic; data is divided into individual packets and loaded onto the loop, *see id.* at 24015-16, 24026-27 (¶¶ 6, 29), while voice is carried on the loop in the traditional manner. At the other end of the loop, the second device splits the channels and sends them in separate directions. *Id.* at 24027 (¶ 30). Voice telephone calls are forwarded to and over the ordinary circuit-switched PSTN. *Id.* The data packets, by contrast, are transmitted over an entirely separate packet-switched network to the subscriber's chosen Internet service provider

(which must also obtain a connection to this packet-switched network). The Internet service provider then delivers the subscriber's data into global Internet. *See GTE ADSL Order*, 13 FCC Rcd at 22471-72. In short, unlike an ordinary telephone call, a DSL transmission never travels over the PSTN once it leaves the loop. *See Advanced Services Order*, 13 FCC Rcd at 24027 (¶ 30) ("Thus, the data traffic, after traversing the local loop, avoids the circuit-switched telephone network altogether.").

A DSL service provides a subscriber with a dedicated, always-on connection to his or her predesignated Internet service provider. DSL establishes a fixed logical channel (or "permanent virtual connection") across its packet-switched network between the subscriber and the Internet service provider. *See, e.g., id.* at 24033 n.73 (¶ 42 n. 73). As a result, rather than having to dial a telephone number to establish a connection for each new conversation or data transmission (as is necessary with a traditional circuit-switched dial-up connection to an Internet service provider), a subscriber's connection is "always on" once the initial connection with the Internet service provider has been made. *See GTE ADSL Order*, 13 FCC Rcd at 22467. By the same token, DSL enables a subscriber to connect *only* to the Internet service provider that the subscriber has previously designated to be at the other end of the packet-switched data "pipeline." DSL does not allow any-to-any local "intercommunicating," as does traditional circuit-switched telephone service. *See* 47 U.S.C. § 153(47)(A). The subscriber's communications with the various servers that comprise the global Internet are all made through a single point of connection with a single, predesignated Internet service provider.

D. The *Advanced Services Order*

In February 1998, U S WEST petitioned the FCC to clarify the regulatory treatment of certain DSL and other data services. U S WEST proposed to offer high-speed data-only services to its customers, primarily rural homes and businesses in the western United States. *Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Dkt. No. 98-26 (filed Feb. 28, 1998) (hereinafter "*Petition for Relief*"). (J.A. ___-___.) At roughly the same time, several other incumbent local telephone companies also petitioned for declaratory relief and the adoption of new FCC rules, as did a public-interest organization and a trade association of new local entrants.[6/] The FCC set all these petitions out for public comment.

In its Petition for Relief and its comments on other parties' petitions, U S WEST asked the FCC to clarify that its DSL services are not subject to local exchange carrier regulation under sections 251(b) and (c) of the 1996 Act because they do not constitute "telephone exchange service" or "exchange access" as the Act defines these terms. *Petition for Relief* at 45-46 n.24 (J.A. ___-___); *Reply Comments of U S WEST Communications, Inc.*, CC Dkt. No. 98-

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6/ *See Petition of Bell Atlantic Corp. for Relief from Barriers to Deployment of Advanced Telecomm. Svcs.*, CC Dkt. No. 98-11 (filed Jan. 26, 1998); *Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking To Implement Sec. 706 of the 1996 Telecomm. Act*, CCB/CPD No. 98-15 (filed Feb. 18, 1998); *Petition of Ameritech Corp. To Remove Barriers to Investment in Advanced Telecomm. Capability*, CC Dkt. No. 98-32 (filed Mar. 5, 1998); *Petition of the Ass'n for Local Telecomm. Svcs. (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecomm. Capability under Sec. 706 of the Telecomm. Act of 1996*, CC Dkt. No. 98-78 (filed May 27, 1998); *Southwestern Bell Tel. Co. et al. Petition for Relief from Regulation Pursuant to Section 706 of the Telecomm. Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Svc.*, CC Dkt. No. 98-91 (filed June 9, 1998).

26 at 18-20 (filed May 6, 1998) (hereinafter "*Reply Comments*") (J.A. ___-___); *Comments of U S WEST, Inc.*, CC Dkt. No. 98-78 at 11-17 (hereinafter "*Comments on ALTS Petition*") (J.A. ___-___). U S WEST contended that the DSL services described in its petition are fundamentally unlike the local, two-way, circuit-switched services described in the first half of Congress's definition of "telephone exchange service" (and long held by the FCC to come within that definition), and that such DSL services are not "comparable services" under the second half of the definition because they are not functional or market substitutes for local, two-way, circuit-switched telephone service. *Petition for Relief* at 45-46 n.24 (J.A. ___-___); *Reply Comments*, at 19-20 (J.A. ___-___); *Comments on ALTS Petition* at 15-17 (J.A. ___-___). U S WEST further contended that DSL is not "exchange access" because it does not involve access to "telephone exchange services or facilities" and is not used for "telephone toll services." *Comments on ALTS Petition* at 17 (J.A. ___).[7]

In a consolidated order addressing all of the petitions, the FCC rejected U S WEST's arguments. *See Advanced Services Order*, 13 FCC Rcd at 24031-34 (¶¶ 38-44). (The relevant section of the *Advanced Services Order* is reproduced in Addendum B to this brief. The entire order appears in the Joint Appendix starting at J.A. ___.) The FCC declared that DSL services are *either* telephone exchange service *or* exchange access, but it declined to say which. *Id.* at 24032 (¶ 40). The agency gave no reason *why* either definition covers DSL services.

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[7] U S WEST also asked the FCC, if it *did* find that U S WEST's DSL services constitute "telephone exchange service" or "exchange access," to forbear from applying local marketplace regulation to these services. *Petition for Relief* at 44-52 (J.A. ___-___); *Reply Comments* at 20-22 (J.A. ___-___); *Comments on ALTS Petition* at 17-21 (J.A. ___-___). The FCC's resolution of this alternative request is not at issue in this appeal.

Indeed, it did not articulate any interpretation of any of the relevant statutory terms whatsoever. Instead, the FCC merely stated that it disagreed with U S WEST's construction of the Act. *Id.* at 24032 (¶ 41).

The FCC did not acknowledge its long line of rulings holding that "telephone exchange service" refers to ordinary local, two-way, circuit-switched service. It also rejected, without explanation, U S WEST's argument that "comparable" services must be functionally similar to or market substitutes for these traditional local services, and it did not offer an alternative meaning for "comparability." *Id.* The FCC did not address the statutory definition of "exchange access" service at all except to recite it. *Id.* at 24032 n.70 (¶ 41 n.70). The FCC thus made no attempt to explain why it could legally extend local marketplace regulation to these new DSL services; it simply asserted that it "[saw] nothing . . . mandating a conclusion" to the contrary. *Id.* at 24033 (¶ 42).

SUMMARY OF ARGUMENT

The *Advanced Services Order* violates the Telecommunications Act, ignores longstanding FCC precedent, and bears none of the indicia of reasoned agency action. Whereas Congress carefully defined the local telephone services — "telephone exchange service" and "exchange access" — that would subject a carrier to local exchange marketplace regulation, the *Advanced Services Order* extends that regulation to data and Internet services having *none* of the characteristics Congress specified. Adding insult to error, the *Advanced Services Order* provides no justification at all for this extension, other than that the FCC saw no reason *not* to regulate.

The Act defines "telephone exchange service" as either service *within* a local exchange that permits all subscribers to call each other for a basic price, or "comparable" service. U S WEST's DSL services do not meet either half of the definition. Internet-bound DSL communications do not stay within a local exchange and do not transit or interconnect with the local exchange network; moreover, DSL does not provide universal local connectivity and is not included in a subscriber's basic local calling charge. Nor are such DSL services "comparable" to the local calling services described in the first half of the definition: They are a supplement to, and not a substitute for, basic local service, and DSL is not functionally equivalent to two-way switched local calling. Indeed, the FCC itself has consistently held that services bearing the characteristics of DSL do not meet the definition of "telephone exchange service."

Moreover, U S WEST's DSL service is not "exchange access." The statutory *sine qua non* of "exchange access" is that it is used for "telephone toll service" — defined in the Act as telephone-to-telephone long-distance calling. The FCC has made clear that services that connect subscribers to Internet and other data service providers are "*information* access" links, not "exchange access."

In addition to being contrary to the Telecommunications Act, the *Advanced Services Order* falls short of the reasoned decisionmaking required of administrative agencies. The FCC rejected U S WEST's proffered construction of the Act based on nothing more than its own *ipse dixit*, and it proposed no alternative interpretation of the statutory language in place of U S WEST's. Because the FCC never bothered to explain *why* it believed it could stretch "telephone exchange service" and "exchange access" to cover DSL services, it is impossible to know whether the *Advanced Services Order* is the product of rational thinking, and impossible to

predict what rules the FCC will apply in future cases. At a minimum, the Court should vacate the *Advanced Services Order* and remand it to the FCC for more reasoned consideration.

ARGUMENT

I. THE FCC VIOLATED THE 1996 ACT BY EXTENDING LOCAL EXCHANGE MARKETPLACE REGULATION TO NEW SERVICES THAT ARE NEITHER "TELEPHONE EXCHANGE SERVICE" NOR "EXCHANGE ACCESS."

In the *Advanced Services Order*, the FCC recognized that a carrier's network- and market-opening "obligations under section 251 turn on whether the carrier is providing 'telephone exchange service' or 'exchange access.'" *Advanced Services Order*, 13 FCC Rcd at 24031 (¶ 38). Congress took care to define "telephone exchange service" and "exchange access" to refer to ordinary local telephone services provided over the traditional PSTN and "comparable" services. But the FCC drained these statutory definitions of any meaning by stretching them to cover new DSL services that are not local, do not use the PSTN, do not provide universal connectivity within a local exchange, and are not market or functional substitutes for local telephone service. The agency accomplished this by pure *ipse dixit*: Rather than explain how the statutory definitions could be read to apply to DSL services, the FCC simply announced that it "s[aw] nothing . . . mandating a conclusion" that these definitions could *not* apply. *Id.* at 24031 (¶ 42).

The Court should reverse the *Advanced Services Order* as contrary to the plain language of the Act and the FCC's own consistent understanding of that language. Because Congress precisely defined the statutory terms in question, "there is no occasion for deference" to the agency's ruling. *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 190 (D.C. Cir. 1995).

Moreover, the *Advanced Services Order* does not articulate any affirmative interpretation of the statutory language to which this Court could possibly defer. This Court has held that it "cannot defer to a vacuum," *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769, 774 (D.C. Cir. 1988), or "to mere decisional evasion." *Competitive Enterprise Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992). *See also Achernar Broad. Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995) ("While agency expertise deserves deference, it deserves deference only when it is exercised.").

A. Digital Subscriber Line Services Are Not "Telephone Exchange Service."

Congress defined "telephone exchange service" as "(A) service ***within a telephone exchange***, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers ***intercommunicating service*** of the character ordinarily furnished by a single exchange, and which is ***covered by the exchange service charge***, or (B) ***comparable service*** provided through a system of switches, transmission equipment, or other facilities . . . by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47) (emphasis added). U S WEST's DSL services do not meet either half of this definition.

1. Digital subscriber line services are not intercommunicating services within a local telephone exchange and are not covered by the exchange service charge.

The first half of the definition of "telephone exchange service," 47 U.S.C. § 153(47)(A), has remained substantially unchanged since the original Communications Act of 1934. *See* Pub. L. No. 416, § 3(r), 48 Stat. 1064, 1066 (1934). It describes ordinary, circuit-

switched local telephone service: that is, an "intercommunicating" service among all the subscribers "within" a single telephone exchange or set of exchanges in the same local area, for which subscribers pay a basic local service charge (the "exchange service charge"). 47 U.S.C. § 153(47)(A). The FCC has long interpreted this definition narrowly to refer to "the provision of individual two-way voice communication by means of a central switching complex to interconnect all subscribers within a geographic area." *Application of Midwest Corp.*, 53 F.C.C.2d 294, 300 (1975). *See also Offshore Tel. Co. v. South Cent. Bell Tel. Co.*, 6 FCC Rcd 2286, 2287 (1991) (telephone exchange service is "a local calling capability that permits a community of interconnected customers to make calls to one another over a switched network"); *Domestic Public Radio Svc.*, 76 F.C.C.2d 273, 281 (1980) (same formulation as *Midwest Corp.*). The FCC itself has continued to interpret this part of the statutory definition exactly the same way *since* the passage of the 1996 Act. *See Application of BellSouth Corp. et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20621 (1998) (hereinafter "*BellSouth Order*") (same formulation as *Midwest Corp.*). Indeed, the FCC has concluded that, by leaving this half of the definition of "telephone exchange service" unchanged in the 1996 Act, Congress intended to ratify and incorporate the agency's longstanding interpretation of the statutory term. *See BellSouth Order*, 13 FCC Rcd at 20621 & n. 64 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) and *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 655 (3d Cir. 1993)).

The *Advanced Services Order* does not attempt to explain how DSL services meet either the text of 47 U.S.C. § 153(47)(A) or the FCC's own consistent interpretation of that text. Any such attempt would have been doomed to fail. First, whether considered from a service or a facilities perspective, DSL services do not begin and end "within" a "telephone exchange" or set

of exchanges in the same local area. 47 U.S.C. § 153(47)(A). Considering the former: Customers use DSL services predominantly for high-speed Internet access, not for local communication within an exchange. *See GTE ADSL Order*, 13 FCC Rcd at 22470-72; *Bell Atlantic Tel. Cos.*, 13 FCC Rcd 23667, 23668 (1998). A DSL customer sends a short burst of data over a dedicated, high-speed connection to a predesignated Internet service provider, which then forwards the data to the worldwide network of servers (data storage centers) comprising the Internet. *See GTE ADSL Order*, 13 FCC Rcd at 22471-72. The FCC deems this to be a single connection between the end user and any Internet server with which the user communicates, wherever in the world that server is located.[8/] In fact, the FCC recently confirmed that DSL-based Internet connections "do not terminate at the [Internet service provider's] local server . . . but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user" — in other words, outside the user's local exchange. *GTE ADSL Order*, 13 FCC Rcd at 22476.

Nor do DSL services use or interconnect with the facilities that the FCC has consistently associated with "telephone exchange service" — the traditional circuit-switched PSTN. *Compare BellSouth Order*, 13 FCC Rcd at 20622 (finding PCS wireless service to be "telephone exchange service" because PCS users "are interconnected to the public switched network by means of a central switching complex, and thus are able to place and receive calls . . . to users of other networks connected to the public switched network"), *with General Tel. Co. of*

8/ *See, e.g., Teleconnect Co. v. Bell Tel. Co. of Penn.*, 10 FCC Rcd 1626, 1628-29 (1995); *Petition for Emergency Relief and Declaratory Ruling filed by BellSouth Corp.*, 7 FCC Rcd 1619, 1620 (1992).